Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

* * *

NO. 73-1462

MARK WHITE, ET AL.,
Appellants

V.

DIANA REGESTER, ET AL.,
Appellees

MARK WHITE, ET AL.,
Appellants

V.

FRANK A. ESCALANTE, ET AL.,
Appellees

MARK WHITE, ET AL.,
Appellants

V.

JAMES GASKIN, ET AL.,
Appellees

MARK WHITE, JR., ET AL.,
Appellants

V.

WANDA L. CHAPMAN, ET AL.,
Appellees

* * *

On Appeal From The
United States District Court For
The Western District of Texas

* * *

APPELLANTS' REPLY BRIEF

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

* * *

NO. 73-1642

MARK WHITE, ET AL.,
Appellants

V.

DIANA REGESTER, ET AL.,
Appellees

MARK WHITE, ET AL.,
Appellants

V.

FRANK A. ESCALANTE, ET AL.,
Appellees

MARK WHITE, ET AL.,
Appellants

V.

JAMES GASKIN, ET AL.,
Appellees

MARK WHITE, JR., ET AL.,
Appellants

V.

WANDA L. CHAPMAN, ET AL.,
Appellees

* * *

On Appeal From The
United States District Court For
The Western District of Texas

* * *

APPELLANTS' REPLY BRIEF

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

I.

THE APPEAL IN THIS CASE IS PROPERLY BEFORE THIS COURT PURSUANT TO 28 U.S.C., SECTION 1253.

In response to Appellees' Regester, et al., Moreno, et al., Chapman, et al., Wright, et al., and Warren, et al., contention that the instant appeal is not properly before this Court (Point III, Page 47, Brief of Appellees Regester, et al., Moreno, et al., Chapman, et al., Wright, et al., and Warren, et al.), Appellants respectfully submit that this Court has jurisdiction over this appeal pursuant to 28 U.S.C., Section 1253 (1970), the "Three-Judge Court Act". The Act permits direct appeal to this Court "from an order granting. . .an injunction. . .in. . .(a) . . .civil action required by. . .(an). . .Act of Congress to be heard and determined by a district court of three judges." Such a three-judge court is required in order to enjoin the enforcement, operation, or execution of a State statute or regulation having statewide application or effectuating a statewide policy. 28 U.S.C. Sec. 2281 (1970). Board of Regents v. New Left Education Project, 404 U.S. 541 (1972). The subject of this appeal, the multi-member districting plan adopted by the Texas Legislative Redistricting Board, is precisely the sort of State statute or regulation so contemplated.

The plan, promulgated by elected State officials pursuant to the Texas Constitution, Article III Section 28, is an integral part of the apportionment system applicable to the entire State. That

system has an important impact on the nature of the State's political structure and the identity of the State's decision-makers. It may, for example, largely determine the relative unity and strength of the representatives of the State's urban population. Or, it may greatly influence the extent of political polarization within the legislature. The apportionment system, then, provides a compass whereby the future directions of the state may be charted. Any substantial change in it may affect every voter in every district of the State. Appellees initially challenged the entire multi-member districting plan by claiming that no multi-member district could pass Constitutional muster under the Equal Protection Clause. Subsequently, Appellees conceded that as to two of the districts, Hidalgo County and Galveston County, they had no evidence to buttress their claim. Lack of proof or confession of error, however, does not determine the jurisdiction of this Court. Appellees made a Constitutional attack on a State statute or regulation of statewide application. Therefore, this Court has jurisdiction over this appeal.

Moreover, the plan effectuates the long-time Texas policy of multi-member districting. Every apportionment system must balance the community of interests against the diversity of interests within a particular region. That balance is a critical element of any representative government. Texas has traditionally struck that delicate balance by providing: (1) single-member districts for large, sparsely-populated areas; (2) multi-member districts for well-defined, heavily-populated areas; and (3) single-member districts for sprawling, densely-populated, highly-diverse areas, like the Houston

area. The plan challenged by Appellees would further this historic Texas policy. Appellees filed suit to reverse this policy. Prior decisions by this Court holding that multi-member districting is not a per se violation of the Equal Protection Clause prevented Appellees from making a frontal attack on the policy. See Fortson v. Dorsey, 379 U.S. 433 (1965); Burns v. Richardson, 384 U.S. 73 (1966); Kilgarin v. Hill, 386 U.S. 120 (1967). Appellees were obligated to allege and prove that each multi-member district operated unconstitutionally. The style of the pleadings submitted and the nature of the proof offered, however, do not determine the jurisdiction of this Court. Appellees made a Constitutional attack on a State statute or regulation effectuating a statewide policy. Therefore, this Court has jurisdiction over this appeal.

Actually, this Court's decision in White v. Regester, 412 U.S. 760 (1973), the decision that spawned this litigation, clearly disposes of the jurisdictional question raised by Appellees. In that case a three-judge district court was convened to hear a two-pronged attack on the apportionment system promulgated by the Texas Legislative Redistricting Board. With respect to the first prong, the one-man one-vote claim, the district court merely declared the system unconstitutional. Such declaratory relief could not support the appellate jurisdiction of this Court. Mitchell v. Donovan, 398 U.S. 427 (1970). And this Court so noted. 412 U.S. at 760. However, with respect to the second prong, the multi-member district challenge, the district court issued an injunction dealing with Bexar and Dallas Counties. Upholding its appellate

jurisdiction this Court held it "literally an order 'granting. . .an. . .injunction in any civil action . . .required. . .to be heard and determined by a district court of three judges within the meaning of Section 1253'." 412 U.S. at 761. White v. Regester, then, is a square holding that a constitutional attack on multi-member districting accompanied by injunctive relief will support the appellate jurisdiction of this Court pursuant to 28 U.S.C. Sec. 1253 (1970). That holding should be followed in the controversy at bar.

This Court's earlier decision in Board of Regents v. New Left Education Project, 404 U.S. 541 (1972), does not dispose of the jurisdictional question raised by the Appellees, but it certainly does lend support to Appellants' position. In that case, a three-judge district court issued an injunction against certain rules promulgated by the University of Texas System Board of Regents. This Court held that it lacked jurisdiction to hear the ensuing appeal because the challenged rules did not and could not have a statewide application nor effectuate a statewide policy. This Court noted that the rules affected and could only affect three of twenty-three state colleges and universities. Unlike the Regents' rules, however, the Legislative Redistricting Board's apportionment system does and necessarily must affect the entire State. Therefore, this Court should hold, unlike Board of Regents v. New Left Education Project, that it has jurisdiction over the instant appeal.

For these reasons stated herein, this Court should hold that it has jurisdiction over this appeal.

White v. Regester also disposes of the question of whether this Court has jurisdiction over the appeal from the declaratory judgment entered for Galveston County. That decision held that it was proper for this Court to entertain the appeal from the one-man one-vote declaratory judgment even though appellate jurisdiction was supported solely by the challenge to an injunction against multi-member districts. That holding should be followed here. The appeal from the Galveston County judgment should be entertained along with the appeal from the multi-member district plan injunction.

Appellants respectfully direct the Court's attention to Appellants' Reply to Appellees Regester, Bernal and Escalante Motion to Dismiss and in Opposition to Appellants Motion to Dispense with Printing filed in April, 1974 with regard to Appellees' contentions that this appeal was not properly docketed in accordance with Rule 13, Supreme Court Rules of Procedure.

II.

Pursuant to agreement of Appellants, counsel for Appellees and Mr. Michael Rodak, Clerk of the United States Supreme Court, regarding a typographical error in the Brief of Appellees, Appellants have agreed to call the Court's attention to the error and its corrections. (See Exhibit 1 to this Reply Brief, Letter of November 1, 1974 to Mr. Michael Rodak, Clerk, United States Supreme Court.)

At page 42 of Appellees Regester, et al.,

Moreno, et al., Chapman, et al., Wright, et al., and Warren, et al., the second sentence of the second paragraph reads as follows:

> "However, the Legislature has been in both regular and special session since this Court's decision in White v. Regester, 412 U.S. 755 (1973), and attempts to produce single-member apportionment bills have been singularly unsuccessful."

The sentence should read:

> "However, the Legislature has been in session since this Court's decision in White v. Regester, 412 U.S. 755 (1973) and attempts to produce single-member apportionment bills have been singularly unsuccessful."

Appellants respectfully point out, however, that although the Legislature has been in session since July of 1973, the session referred to was a Special Session called by the Governor of the State of Texas for the singular purpose of reducing the legal speed limit in the State of Texas to 55 miles per hour. The Texas Legislature convened from December 18 through December 20, 1973. The Texas Legislature has not met in regular or special session since that time.

Respectfully submitted,

JOHN L. HILL
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CERTIFICATE OF SERVICE

I, Elizabeth B. Levatino, Special Assistant Attorney General of Texas, attorney for Appellants, hereby certify that true correct copies of the above foregoing Appellants' Reply Brief have been served upon opposing counsel by placing copies in the mail, prepaid, to Mr. Norman M. Bonner, Suite 838, Baker Building, 7th & Houston, Fort Worth, Texas 76102; Mr. Phillip Crawford, P.O. Box 6277, Austin, Texas 78762; Mr. Dave Richards, 600 West 7th Street, Austin, Texas 78701; Mr. Don Gladden, 702 Burk Burnett Building, Fort Worth, Texas 76101; Mr. R. James George, Jr., P. O. Box 98, Austin, Texas 78767; and Mr. George Korbel, Mexican-American Legal Defense and Education Fund, 501 Petroleum Commerce Building, 201 N. St. Mary's Street, San Antonio, Texas 78205; Mr. George Korbel, Shi-Liti Center, Room 902 536 S. Clark, Chicago, Illinois 60605.

ELIZABETH B. LEVATINO

APPENDIX A

November 1, 1974

Mr. Michael Rodak
Clerk
United States Supreme Court
United States Supreme Court Building
1st Street, NE
Washington, D.C. 20543

Re: White v. Regester, No. 73-1462

Dear Mr. Rodak:

At page 42 of our Appellees' Brief (yellow cover) in the second sentence of the second paragraph, there appears to be a typographical error which should be corrected. That sentence now reads:

> However, the Legislature has been in both regular and special session since this Court's decision in White v. Regester, 412 U.S. 755 (1973), and attempts to produce single-member apportionment bills have been singularly unsuccessful.

The sentence should read:

> However, the Legislature has been in session since this Court's decision in White v. Regester, 412 U.S. 755 (1973), and attempts to produce single-member apportionment bills have been singularly unsuccessful.

We have been in touch with Elizabeth Levatino, one of the attorneys for the Appellant, State of Texas, and it is my understanding that she will be commenting on this change in her reply brief.

If this manner of correction is unacceptable to the Court, please let us know, and we will take whatever other steps which may be necessary.

Very truly yours,

George J. Korbel
Staff Attorney

GJK:meg

cc: All counsel of record